SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 145

BRIAN RANDOLPH FLESCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1970. See Appendix B to this petition.[1]

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to June 2, 1970.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The constitutional questions raised by petitioner involve both the First and the Fifth Amendments.

First Amendment: Is conscientious objection something under a young man's control and therefore an exception contemplated by the administrative agency regulation, 32 C.F.R. § 1625.2, that makes the issuance of an Order to Report for Induction the deadline for new information excepting only that of a status arising beyond his control?

Fifth Amendment: Two problems arise here: (1) May a conclusion be reached by a fact finding without the presence of any factual basis? (2) May an administrative agency's regulation contravene the intent of Congress?

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1. This petitioner's Petition for Rehearing was denied by the Court of Appeals on April 3, 1970. See Appendix C to this Petition.

The questions were raised in the trial court by a written motion for judgment of acquittal and briefed in the Court of Appeals.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. § 1625.2. They are set forth in Appendix D.

5. STATEMENT OF THE CASE

The indictment charged Flesch with a violation of the Universal Military Training and Service Act for refusing to submit to induction. [CT. 2].

Flesch pleaded "not guilty" and was tried by the Honorable Charles H. Carr, District Judge, sitting alone without a jury. He was found guilty and given a three year sentence.

6. THE FACTS

The facts are found in two places: (1) The complete Selective Service System file of the appellant[2] and (2) the oral testimony in the trial court found in the Reporter's Transcript of Proceedings.[3]

The written evidence shows that the appellant, Brian Randolph Flesch, registered with the Selective Service System on June 23, 1964. [Ex. 1].

On June 20, 1967, appellant was classified I-A. [Ex. 11] and [RT. 96]. He was ordered to report for induction October 17, 1967.

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2. This file, Government's Exhibit No. 1, is pencil paginated at the bottom of each sheet and is hereinafter referred to by sheet number, such as [Ex. 1].

3. RT. refers to the Reporter's Transcript of Proceedings.

On October 13, 1967, appellant completed and submitted to his Local Board SSS Form 150 for conscientious objectors. On October 17, 1967, he refused induction. [Ex. 11] and [RT. 97].

His SSS file was forwarded within the system for review but his classification was not reopened. He was sent a letter on January 3, 1968, advising him of the board's determination in giving him a new date under the continuing order to report for induction of January 16, 1968. [RT. 97]. Appellant reported and refused induction on January 16, 1968. [Ex. 11].

7. REASONS FOR GRANTING A WRIT

A national decision is required on two constitutional problems, ones that have left the lower courts divided.

The appellate courts are divided on the question: Is conscientious objection a circumstance over which a registrant of the Selective Service System has control? The question arose because a regulation [§ 1625.2 of 32 C.F.R.] of this agency requires all evidence be in before it issues an Order to Report for Induction, excepting only evidence of a status "beyond the registrant's control."

Also present is the question whether this regulation is contrary to the intent of Congress.

8. ARGUMENT

I

Tension Between Act and Agency Regulation

Congress explicitly established conscientious objection and nowhere, even by implication, set a deadline for its presentation.

Petitioner refers to the dilemma involved in a confrontation between an Act of Congress and an agency regulation.

Congress by law clearly intended to expeditiously raise an army. But it is the will of Congress, by unequivocal expression in the law, that conscientious objectors should be exempt.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is true, as an early Supreme Court decision puts it "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations." *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175 (1932).

Yet one of the settled portions of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that branch of government to any other body or authority. As the Supreme Court stated it: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).

But the President may prescribe administrative rules upon Congressional authorization. *United States* v. *Gri-*

maud, 220 U.S. 506, 521, 31 S.Ct. 480, 484, 55 L.Ed. 563 (1911). It is true in modern times that this doctrine has been widening, for as Mr. Justice Douglas declared, with only Mr. Justice McReynolds dissenting: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940).

Yet despite the widening, it is still a clear principle of constitutional law that the President may not legislate contrary to Congressional law.

As the Supreme Court declared in *Koshland* v. *Helvering*, 56 S.Ct. 767, 298 U.S. 441, 80 L.Ed. 1268, 105 A.L.R. 756 (1936): "Where provisions of a statute are unambiguous and its directions specific, the statute cannot be amended by regulation." For, as the Court pointed out, "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Dixon* v. *United States*, 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965). Speaking for the Court at 1304, Mr. Justice Brennan then went on to declare: "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Pursuant to the delegated powers in the Act, regulations were adopted for administrative procedures. 10 (b) 1 of the Act provides: "The President is authorized—to prescribe the necessary rules and regulations to carry out the provisions of this title."

The regulations, promulgated by the President, provide procedures for determining the merit of claims for

deferment. Those procedures provide that the registrant may ask for a face to face confrontation with the local board and, if it rejects his claim, for a review of his file by the State Appeal Board. A short cut, one that does not offer him either, or both, of these avenues of relief is unlawful.

It is submitted that the provision of the Act concerning conscientious objectors is unambiguous and its direction specific.

A pertinent restatement of it is found in the Department of Defense directive to all the eleven armed services:

> ". . . the Congress, as indicated by provisions of P.L. 90-40 (reference (c)) and related statutes, has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces. . . ." (DoD Directive No. 1300.6].

It is clear that Congress put no time limit on the presentation of such a claim. Any administrative inconvenience that results from "late" filing is to be remedied by Congress, not by the agency. Every agency, and this one, certainly has administrative inconveniences and frustrations. There is no legal excuse for short cuts to avoid them, in the face of Congressional intent.

Neither the President nor his representative can nullify the will of Congress by prescribing regulations which are contrary to the intent of the statute enacted by Congress.

In regards to conscientious objectors, it is submitted that 32 C.F.R. § 1625.2 is contrary to Congressional will as enacted into law and hence null and void.

Congressional policy against requiring combatant training and service of those conscientiously opposed to partic-

ipation in war is one of long standing. *Seeger* v. *United States*, 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty.

The majority opinion in the "controlling" case, *Ehlert* v. *United States*, 9 Cir., 1970, ... F.2d ....., 2 SSLR 3495, recognizes that many of the Courts of Appeals differ on this point and states

> "Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States* v. *Sandbank*, 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States* v. *Geerey*, 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene* v. *United States*, 266 F.2d 378 (10th Cir. 1959)."

The minority opinion in *Ehlert*, Judge Merrill speaking, with the four other dissenting circuit judges concluded that "I would hold the regulation to be contrary to statute and invalid." The majority had held that a change in a registrant's status (after he had received an induction order) to that of a conscientious objector was a situation over which registrant had control, *but it did not concern itself at all* with the point we advance.

As Judge Merrill stated in *Ehlert*:

> "Legislation creating this exemption from military service, 50 U.S.C. App. § 456 (j), provides for no such limitation. The enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It

> acts upon the substance of the status itself, and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service."

Concerning conscientious objection, it is clear that the Congressional statute states and defines the rights of the registrant and fixes a standard by which such rights are to be measured.

The regulations constitute a step in the administrative process, but they cannot alter the Congressional will as expressed by statute. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936); *Dixon* v. *United States,* 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965).

The President himself recognizes the authority of Congress in this regard. For example, under the Military Selective Service Act of 1967, the President realized he had not been given power to institute a random selection system to draft registrants into the armed services. Possibly because such a matter involved *all* registrants (and conscientious objection only a few). In any event the President requested Congress to change the law. The President recognized that the wise and legal course was not to change the law by new regulations. Congress passed the Selective Service Amendment Act of 1969 (P.L. 91-124) and the President signed it on November 26, 1969.

Another example to prove the point was the seizure of the steel mills of the country by President Truman on April 8, 1952, in a labor dispute. In that situation the Su-

preme Court held that the President could not act contrary to Congressional will. The President had no power to seize the mills without Congressional authorization. When Congress passed the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. The power that the President exercised was lawmaking power, which the Constitution vests in the Congress alone. It is the function of the President to take care that the laws be faithfully executed, not act contrary to Congressional will as expressed by law.[4] *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

In regards to exemption of conscientious objection, the will of Congress is clear. It is stated by a clear, definite, unambiguous statute.

We have the same situation in this draft case.

Once the will of Congress is expressed by law, the President can implement that will by rules and regulations. He cannot, by regulation, legislate contrary to that will.

It may be true, as Professor Kenneth Davis has pointed out (*Administrative Law Treatise*, Volume 1, Section 5:09), that at certain times ascertainment of the intention of Congress in regards to a statute may be impossible. But such is not the case here.

In regards to conscientious objectors the language of the law is clear. The President by regulation cannot change substantially what Congress has willed by law. In regards to conscientious objector registrants 32 C.F.R. § 1625.2 is contrary to the statute and hence invalid.

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4. Mr. Justice Frankfurter stated at page 602: "Congress has expressed its will to withhold this power [of seizure] from the President *as though it had said so* in so many words." [Italics supplied].

II

Some Draft Cases Already Support the View That This Act Must Take Precedence Over § 1625.2

There is no need to recite *Gearey* or similar opinions for they are listed in the majority's slip opinion, on page two.

One not listed gives the rationale well:

The facts are on January 29, 1951, defendant mailed to the board a request for appeal from their ruling on his claim. This notice was received by the board on February 3, 1951. Prior thereto, on February 2, 1951, the board mailed a notice to the defendant to report for induction. [p. 614].

The opinion says:

> "Although the regulations, literally construed, tend to support this position, we think that a right of appeal does exist in this case. An Act of Congress creates that right without any express limitation, and it seems unreasonable to hold that Congress intended the right of appeal to exist only where the claim for exemption as a conscientious objector was considered at the time of the initial classification. This would be the result in effect if we accept the Government's contention. The right of appeal would exist only in cases where the claim is considered at the time of the initial classification; in all other instances the local board would be able to determine whether a claimant should have an appeal merely by framing its order as a refusal to reopen the original classification rather than an order granting a reopening of the classification on which a hearing would be held and the right of appeal from an adverse determination granted." *United States* v. *Clark*, W.D.Pa., 1952, 105 F.Supp. 613, 615.

III

The Denial of Due Process

In a recent case the Second Circuit Court of Appeals stated:

> ". . . despite the inconvenience occasioned by the reopening of a registrant's classification after he has been called for induction, a registrant whose conscientious objections crystallize only after the issuance of an induction order and who presents his request for classification as a conscientious objector at the earliest possible time, is entitled to have his classification reopened and considered anew." *United States* v. *Holmes,* No. 32788 (C.A. 2, Jan. 12, 1970).

Petitioner Flesch presented his prima facie claim for his conscientious objector status at the earliest possible time after his crystallization. Not only did the Selective Service System local board refuse to reopen, but it did not invite petitioner to appear before it to discuss his claim.

The policy of the Selective Service System is that if the local board determines that it cannot grant a I-O claim then "the local board should invite or request the registrant to meet with it for an interview. . . ." *Local Board Memorandum No. 41* (Issued Nov. 30, 1951, Amended July 30, 1968). This petitioner's local board did not do.

Surely to recommend that the local boards grant interviews to I-O claimants and then to permit certain board not to grant interviews violates due process of law and is contrary to the Fifth Amendment.

As the Court stated in *MacMurray* v. *United States,* 9 Cir., 1954, 330 F.2d 928 at 932, 934:

> "Denial of inquiry and hearing is fatal to the validity of an induction order unless it appears beyond

> doubt that the registrant's objections are based upon, in the words of 5456 (j) 'essentially political, sociological, or philosophical views or a merely personal moral code'."

The Court then concluded:

> "Since appellant was denied a hearing with respect to the character of his objections on a record which did not on its face establish clearly and incontrovertibly that his objections were nonreligious in character his conviction cannot stand."

This is the position of petitioner in the matter before this court.

Several of the Circuit Courts are in agreement with petitioner's contentions. In *United States* v. *Holmes*, supra, it was held by the Second Circuit that a registrant's oral claim of conscientious objection status on the very date of induction at the induction station must be considered by the local board. The Seventh Circuit Court of Appeals held that due process was denied when the local board did not consider the conscientious objector claim of a registrant filed one day prior to his induction date. *United States* v. *Shermeister*, No. 17482 (C.A. 7, Jan. 21, 1970), 2 SSLR 3492.

Some courts have held that for the local board to consider a conscientious objector claim submitted by a registrant without reopening violates due process. As Chief Judge J. Nichol stated in *United States* v. *Melrose*, CR68-124S (D.S.D., Dec. 4, 1969), 2 SSLR 3482:

> "By holding that it did not reopen the defendant's classification, the board precluded him from appealing its decision, as the determination not to reopen is not appealable. . . . However, a reopening and consequent determination of the claim on the merits gives the defendant the right to appear before the board thereafter

and to appeal the decision to the administrative appeal boards. Davis v. United States, supra. It is apparent, therefore, that the determination not to reopen is in itself a separate and distinct decision of 'independent procedural significance' even though the board, may, after reopening, give the registrant the same classification as previously held. Robertson v. United States, supra. The board cannot actually determine the claim on the merits, decide not to reclassify the registrant, and then label its action a determination not to reopen, thereby denying the registrant precious appearance and appeal rights. *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967)."

Petitioner's rights to due process were thus violated.

CONCLUSION

For the above given reasons certiorari should be granted and the judgment should be reversed.

Respectfully,

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